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In The

Supreme Court of the United States

October Term, 1975

No. 75-1187

UNITED STATES OF AMERICA ex rel. SHELDON SELIKOFF,

Petitioner,

vs.

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

October Term, 1975

No.

UNITED STATES OF AMERICA ex rel. SHELDON SELIKOFF,

Petitioner,

vs.

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT

Petitioner respectfully prays that this Court issue a writ of certiorari to review the order of the United States Court of

Appeals for the Second Circuit rendered the 21st day of October, 1975, rehearing denied November 26, 1975, which reversed an order of the United States District Court for the Southern District of New York which had granted petitioner's writ of habeas corpus on the grounds that the trial judge should have vacated Selikoff's guilty pleas *sua sponte*.

The United States Court of Appeals, however, stayed execution and issuance of the mandate pending determination of this petition for a writ of certiorari.*

After the commencement of trial upon one of four indictments, Selikoff interrupted the trial and pleaded guilty to one count of grand larceny second degree in full satisfaction of three of the four indictments which related to real estate deals, and pleaded guilty to one count of obscenity in the second degree in full satisfaction of the fourth indictment.

The District Court found as a fact that a promise not to incarcerate petitioner was indeed made by the trial judge at the time the pleas of guilty were obtained.

Subsequently, the County Court of Westchester County refused to honor its unqualified promise not to incarcerate petitioner and directed him to withdraw his pleas of guilty. This would have meant not only restoring the two pleas to trial status which had been taken, but also would have revived the other indictments which were dismissed as a result of the pleas of guilty. Petitioner therefore refused and the Court sentenced him to jail for a period of five years.

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* The docket in the United States Court of Appeals is 75-2085

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Appeals were subsequently taken to the Appellate Division of the Supreme Court in the Second Department. That court affirmed the judgment of conviction by a divided vote, *People v. Selikoff*, 41 App. Div. 2d 376, 343 N.Y.S. 2d 387, *aff'd.*, 35 N.Y. 2d 227, 360 N.Y.S. 2d 623, 318 N.E. 2d 784 (1974).

This Court denied petitioner's petition for a writ of certiorari from the New York Court of Appeals' affirmance; *Selikoff v. New York*, U.S. , 95 S. Ct. 806, 42 L. Ed. 2d 822 (1975).

The petitioner sought out a federal writ of habeas corpus pursuant to 28 U.S.C. §2254, on the ground that the trial judge's failure to fulfill his "unconditional promise" denied defendant due process of law and exposed him to double jeopardy.

The District Court directed that the habeas corpus writ be granted on the grounds that the trial judge should have vacated the pleas of guilty *sua sponte*, thereby permitting Selikoff to plead anew (393 F. Supp. 48 [S.D.N.Y. 1975]).

The United States Court of Appeals reversed the District Court but granted a stay of mandate pending determination of this petition for a writ of certiorari.

OPINIONS BELOW

The United States Court of Appeals reversed the United States District Court on October 21, 1975, under docket number 75-2085. That opinion is annexed to this petition and made a part hereof (1a).

The opinion of the United States District Court is reported at 393 F. Supp. 48 (S.D.N.Y. 1975).

The opinion of the New York Court of Appeals is reprinted in 35 N.Y.S. 2d 227, 360 N.Y.S. 2d 623, 318 N.E. 2d 784 (1974).

The opinion of the Appellate Division of the New York Supreme Court, which affirmed by a divided vote, appears at 41 App. Div. 2d 376, 343 N.Y.S. 2d 387 (2d Dept. 1973).

This Court, without an opinion, had previously denied a writ of certiorari directed to the New York Court of Appeals, *Selikoff v. New York*, —U.S.—, 95 S. Ct. 806, 42 L. Ed. 2d 822 (1975).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The order of the United States Court of Appeals was dated October 21, 1975, but a petition for rehearing was denied on November 26, 1975 (9a). The orders of the Court of Appeals are annexed (11a).

QUESTIONS PRESENTED

1. Whether petitioner Selikoff was denied due process of law when the trial judge arbitrarily and contrary to the wishes of defendant and the District Attorney, unilaterally broke a plea bargain agreement, despite no such recommendation in the presentence report warranting such action? (Fifth and Fourteenth Amendments)

2. Whether a trial judge who has made an unconditional promise not to incarcerate a defendant who has pleaded guilty to two counts of a multi-count set of four indictments, in satisfaction of all four, may compel such a defendant to waive his rights under the double jeopardy clause by withdrawing his plea of guilty and thereby exposing himself anew to all four indictments and all the counts therein? The Court must bear in mind that the pleas of guilty were taken after the commencement of the trial itself on one of the indictments. (Fifth and Fourteenth Amendments)

3. Whether a trial judge may unilaterally reject a plea bargain made in good faith by all parties after full discussions and disclosures by both the District Attorney and defense counsel, and following protracted discussions with the court, solely because of the judge's subjective and visceral feeling that he should not honor it? (Fifth and Fourteenth Amendments)

4. Whether *Santobello v. New York*, 404 U.S. 257, mandates enforcement of a plea bargain, absent fraud by one of the parties?

5. Where, as herein, a defendant cannot be returned to *status quo ante*, because his co-defendants are now out of the case, may a trial judge unilaterally dishonor a plea bargain agreement by merely offering the defendant the opportunity to withdraw his pleas of guilty, taken after the commencement of trial, to which alternative the defendant is opposed?

6. Whether this Court should clarify the enigma created by Justice Douglas' concurring opinion in *Santobello v. New York*, 404 U.S. 257, 263, wherein he indicated that while the states

should ultimately determine what is to be done in connection with disputed plea bargains, that the wishes of the defendant should be given great, if not contolling, weight? It is this enigma that has created the instant problem.

7. Whether plea bargaining retains any significance at all in view of the New York Court of Appeals' apparent holding that a judge may always renege on a promise for any reason whatsoever, so long as he offers a defendant an opportunity to withdraw his plea of guilty?

(a) The New York Court of Appeals does not recognize a reciprocal right on the part of the defendant to ask to have his plea of guilty withdrawn if he later determines that he was the victim of a misunderstanding or is unhappy with the deal. (Fifth and Fourteenth Amendments, Due Process and Equal Protection Clause)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution are involved herein. In addition, Section 390.30(1), New York Criminal Procedure Law, is also involved.

THE BACKGROUND OF THE CASE

Selikoff was indicted under New York laws for four separate multi-count indictments. Under three of these indictments Selikoff was charged with various crimes allegedly

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arising out of a complex real estate swindle. Under the fourth indictment defendant was charged with obscenity and related offenses.

Selikoff pleaded not guilty to all charges.

After the commencement of the trial upon one of the indictments which involved the alleged real estate swindle, the petitioner moved to withdraw his pleas of not guilty. This motion was made after extensive negotiations with the prosecutor and with conferences at the bench with the judge. An agreement was finally reached after discussions with high echelon personnel of the District Attorney's office and the defense counsel and the trial court.

Under this agreement, the defendant was assured that he would not go to jail. The defendant was told by the trial judge:

> "I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against you. Based upon the results of the conferences and conversations and the fact and representation made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises."

The United States District Court found that Selikoff unquestionably was given the distinct understanding that he

would not be incarcerated if he pleaded guilty. It is to be noted further that unlike many, many other justices in the State of New York, the particular judge involved herein did not make the promise contingent upon the probation report or upon any other factor. The promise, therefore, was unconditional.

Even if the promise, however, had been conditioned upon the probation report (see Sections 390.20(1) of the New York Criminal Procedure Law), the court would not have been justified in changing its mind because the presentence report did not recommend that the promise not be enforced. Nor did the District Attorney recommend that it be rejected.

The remaining other defendants in the case proceeded to trial or disposition and in the event Selikoff were made to go back to trial, he would have to go back alone It is thus obvious that he cannot be put back in *status quo ante*. A severance has automatically been obtained.

While the United States Court of Appeals declares that there is authority in New York State that a trial judge cannot *sua sponte*, over objections of a defendant, cause a plea of guilty to be withdrawn, (Slip Opinion 235), it is obvious that if such a ruling violates due process and equal protection of the laws, that this Court certainly has jurisdiction to rectify it.

The New York Court of Appeals ruled in effect that while a trial judge for any reason whatsoever may cause a plea bargain to be broken so long as he offers the defendant an opportunity to withdraw his plea of guilty and go to trial, that such a reciprocal right does not exist for the hapless defendant.

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In other words, it is a unilateral promise, apparently, that is being made. The defendant is stuck with it, but the Court can change its mind at will. If the defendant determines that he was misled by the prosecutor into thinking that he had a very strong case, when in fact he had a very weak case, then, of course, the defendant is just out of luck. On the other hand, a trial judge can order the defendant to withdraw his plea of guilty or go to jail, as happened herein, for any reason whatsoever. For example, if the trial judge is convinced by the prosecutor that it was mistaken about the weakness of its case and now has a strong case, it might very well prevail upon the judge to cause the defendant to withdraw his plea of guilty and go to trial.

An article in the recent Harvard Law Review (Finkelstein, *Guilty Pleas* , 89 Harv. L. R. 293, 309) indicates that most pleas of guilty are obtained because the prosecutor has a weak case.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE UNITED STATES COURT OF APPEALS REVERSING THE UNITED STATES DISTRICT COURT'S GRANTING OF HABEAS CORPUS RELIEF, IS PREDICATED UPON A MISUNDERSTANDING OF THE FACTS OF THE CASE AND UPON A MISAPPLICATION OF THE LAW.

The United States Court of Appeals declared that the trial judge could not "*sua sponte*" order the withdrawal of the guilty pleas of the defendant and compel him to go to trial. The court cites the New York Criminal Procedure Law as authority. (N.Y.C.P.L. §§390.30[1]; 330.20[1]).

Even if the law were to be applied as the United States Court of Appeals indicated it should have been, namely that a trial court cannot pronounce sentence without a presentence report, the case at bar presents no obstacle. In the case at bar the presentence report did not recommend to the trial judge that the plea of guilty be ordered vacated. On the contrary, this was a whim of the trial judge's own idiosyncrasies. Neither the defense nor District Attorney nor Probation Department recommended a change in the plea bargain.

The United States Court of Appeals surmised that because of the existence of Criminal Procedure Law §390.20(1) requiring a report of a presentence investigation before sentence is pronounced, that all plea bargains are therefore tentative, we submit that such is not the law as it is applied, or at least should not be the law. First of all, the defendant is not informed of this fact.

This Court has stated in *McCarthy v. United States*, 394 U.S. 459, 467, n. 20, that where there is a misunderstanding, the plea of guilty cannot stand. See *Kelsey v. United States*, 3 Cir. 1973, 484 F.2d 1198; *Fong v. United States*, 9 Cir. 1969, 411 F.2d 1181, *cert. denied*, 396 U.S. 968.

In the *Fong* case, *supra*, the court indicated that where a defendant pleaded guilty and was told that he could be imprisoned, but nothing was mentioned of a fine, that the portion of the sentence which imposed the fine had to be vacated.

In the case at bar we have just the opposite, namely that *Selikoff* was told that he might be fined but was assured that he

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could not be incarcerated. Under these circumstances, it is respectfully submitted that the defendant's custodial sentence should be vacated and if the Court wishes, perhaps a fine could be imposed.

See also, *United States v. Lester*, 2 Cir. 1957, 247 F.2d 496, 500; *Von Moltke v. Gillies*, 1948, 332 U.S. 708, 724.

See also *Santobello v. New York*, *supra*, and *Marvel v. United States*, 380 U.S. 262.

The United States District Court obviously was aware of the fact that an unconditional promise not to incarcerate Selikoff had been made. Since he had only been led to believe that he could be put on probation or fined, the incarceratory portion of the sentence was a violation of due process of law.

The direction by the trial court that Selikoff should withdraw his pleas of guilty, we submit, was grossly unfair to Selikoff since it would have constituted a waiver of his double jeopardy rights because not only would the two counts to which he pleaded guilty be restored for trial, but all of the other indictments and counts therein would also be restored for trial.

The United States Court of Appeals for the Second Circuit declared at Slip Opinion 236, that the petitioner had already been accorded the relief to which he was entitled since "he has been allowed to replead." It added ". . . If the defendant's pleas were in any way induced by reliance on the trial judge's statements, the opportunity to replead fully remedied any due process deprivations stemming from such inducement."

The United States Court of Appeals' opinion completely overlooked the double jeopardy aspects of the dilemma into which the defendant was placed.

II.

THE UNITED STATES COURT OF APPEALS FAILED TO RECOGNIZE THAT THE OFFER OF THE NEW YORK STATE TRIAL JUDGE TO PERMIT SELIKOFF TO WITHDRAW HIS PLEAS OF GUILTY VIOLATED THE DOUBLE JEOPARDY PROVISIONS OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. COMPELLING SELIKOFF TO WITHDRAW HIS PLEAS OF GUILTY WOULD HAVE RESTORED NOT ONLY THE TWO COUNTS TO WHICH HE PLEADED GUILTY, BUT ALSO THE OTHER INDICTMENTS AND ALL OF THE COUNTS THEREIN AND WOULD HAVE COMPELLED HIM TO GO TO TRIAL ALONE SINCE THE OTHER DEFENDANTS' CASES HAD BEEN DISPOSED OF.

With respect to Point I, we wish to address ourselves to the fact that under the double jeopardy provisions of the Fifth and Fourteenth Amendments of the United States Constitution, the United States Court of Appeals failed completely to come to grips with this issue.

Nothing in the opinion of the United States Court of Appeals even touches on the question of double jeopardy. The defendant herein took his pleas of guilty after the commencement of his trial upon one of the indictments. So far as that is concerned, he obtained a mistrial by virtue of these

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pleas of guilty. The fact is obvious that jeopardy had already attached

Compelling the petitioner to withdraw his pleas of guilty conceivably would have eliminated the possibility that double jeopardy could be raised because it might have been deemed a waiver.

Selikoff, however, did not want to be exposed after he had terminated his trial, to any other jeopardy because of the fact that he had voluntarily assumed the consequences of a plea of guilty during the commencement of his trial.

The court, therefore, deprived him of his due process right to a fair trial by permitting him to abort the trial through a plea of guilty and then, without recommendations from the District Attorney, the defense counsel, or the Probation Department which issues presentence reports, the court *sua sponte* decided not to honor its promise. We maintain that this placed Selikoff on the horns of an impossible dilemma since it meant that he could no longer go to trial on the charge or charges with the co-defendants who he would have gone to trial with and, in addition, in effect the court was exposing him to additional jeopardy because of the fact that he had pleaded guilty during the actual commencement of one of his major trials.

In the motion for rehearing, the United States Court of Appeals was asked to address the question of double jeopardy, but did nothing about it. (See *United States v. Jorn*, 400 U.S. 470.)

A. The enigma and dilemma created by Justice Douglas' concurring opinion in *Santobello v. New York, supra*, should be clarified.

As this Court knows, in the *Santobello* case (which was argued by the writer of this brief), this Court agreed unanimously upon a reversal. It was split 3 to 3, however, on whether or not the plea bargain must be specifically enforced or not. Justice Douglas leaned toward specific performance, but sided with the three justices who remanded to the state court to determine what the state would recommend as a remedy.

Justice Douglas, however, indicated that great, if not controlling, authority should be given to the wishes of the defendant. By that we must interpret that he intended that the defendant be given an opportunity to determine whether he wanted a retrial or wanted the plea bargain.

The dilemma is heightened by the circumstances of the case at bar. In the case at bar, the defendant Selikoff was under four indictments and many counts. The District Attorney, after many discussions with the defense counsel and with the court, finally worked out a plea bargain which was approved by the court.

The court, without qualification, promised Selikoff that he would not go to jail if he pleaded guilty.

The application of Criminal Procedure Law §390.20(1) is not applicable since the presentence report did not recommend any change in circumstances. In that the United States Court of Appeals is clearly erroneous.

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We have also cited several decisions, both of this court and other courts, under Rule 11 of the Federal Rules of Criminal Procedure, such as *McCarthy v. United States, supra,* wherein it is held that where a defendant is misled in a plea bargain, that the bargain cannot stand and the plea of guilty must be vacated. We maintain that the plea of guilty must be vacated whether it is *sua sponte* or otherwise. In no event, however, can the defendant be punished as a result of the plea bargain when he was absolutely and unconditionally told that he would not be incarcerated. When we say "punished," we are talking about incarceration. We realize that a fine or probation remained a possibility.

The District Court apparently was aware that there was a misleading and unfair procedure that had occurred.

Merely giving the opportunity to the defendant to withdraw his plea of guilty meant that he went back to a trial court alone and without co-defendants and faced trial not only upon the two counts to which he pleaded, but upon all of the counts and indictments which had been dismissed.

Petitioner maintains that the court had no right to compel him to go to trial upon all of the counts and all of the indictments after he had aborted his own trial which had commenced and had agreed to plead to two counts in satisfaction of everything.

As we view it, if the District Court's recommendation that the plea of guilty be withdrawn *sua sponte,* the defendant-petitioner could only have been made to go to trial on the two counts which were the subject of his plea of guilty.

We think this Court has an obligation to make a ruling with respect to this aspect as well.

Under the circumstances, it is respectfully submitted that the only fair remedy would be to specifically enforce the promise, unless both the Court and the defendant agrees that it should not be enforced.

We maintain that plea bargaining, absent fraud, must be enforced specifically. We recognize that if the District Attorney, the defense counsel, or the Probation Department, had misled the trial judge, then of course there was a perfect right to order a withdrawal of the plea of guilty.

That is not the case at bar. There is no claim that anyone deceived the trial court.

What happened here was that the trial judge sat through the trial of co-defendants and listened to their testimony. Selikoff was no longer in that trial since he had pleaded guilty to two counts at the commencement thereof. He had no opportunity to confront witnesses; he had no opportunity to present evidence.

The court came to the conclusion on its own that it should not have made the plea bargain which it did. Nobody recommended that it withdraw the plea bargain.

The court on its own, however, decided that it wanted to do so.

Under these circumstances, we maintain that it was unconscionable and in violation of due process to do this

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because it exposed the petitioner not only to retrial on the two counts to which he pleaded, but on all of the four indictments and all of the counts therein.

If plea bargaining means anything, it must be a bilateral and not unilateral affair.

In New York State a defendant does not have the right to withdraw his plea bargain or to ask that his plea of not guilty be reinstated because after reflection he decides that it was not in his best interests to have done what he did.

Yet, the interpretation of the court below and the New York Court of Appeals necessarily means that a trial judge may unilaterally always fail to adhere to a plea bargain, despite absence of fraud, if for any reason whatsoever he decides that he does not choose to honor it. The only apparent requirement is that he offer the defendant an opportunity to withdraw his plea of guilty. We maintain that this is not a plea bargain, but it is an illusory bargain which binds only one party. This is not equal protection of the laws; it is a travesty of both due process and fundamental fairness.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

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APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 218 — September Term, 1975.

(Argued September 5, 1975 Decided October 21, 1975.)

Docket No. 75-2085

UNITED STATES OF AMERICA, ex rel. SHELDON SELIKOFF,

Petitioner-Appellee,

v.

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent-Appellant,

and

THE PEOPLE OF THE STATE OF NEW YORK,

Intervenor.

Opinion of United States Court of Appeals

Before:

SMITH, HAYS, and MESKILL,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*, granting appellee's petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254.

Reversed.

IRVING ANOLIK, NEW YORK, NEW YORK, *for Appellee.*

ARLENE R. SILVERMAN, Assistant Attorney General of New York (Louis J. Lefkowitz, Attorney General of New York, Samuel A. Hirshowitz, First Assistant Attorney General, Burton Herman, Assistant Attorney General, on the brief), *for Appellant.*

JANET CUNARD BROWN, Assistant District Attorney of Westchester County (Carl A. Vergari, District Attorney of Westchester County, White Plains, New York, on the brief), *for Intervenor.*

HAYS, *Circuit Judge:*

The Commissioner of Correction of the State of New York, respondent, and the State of New York, intervenor, appeal from

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an order of the United States District Court for the Southern District of New York granting defendant Sheldon Selikoff's petition for a writ of habeas corpus. We reverse the order of the district court.

Selikoff was indicted in New York under four separate multicount indictments. Under three indictments Selikoff was charged with various crimes allegedly arising out of a complex real estate swindle. Under the fourth indictment defendant was charged with obscenity and related offenses. Defendant pleaded not guilty to all charges.

Shortly after trial commenced on one of the indictments which charged involvement in the real estate swindle, the defendant moved to withdraw his pleas of not guilty. This motion was made after extensive negotiation with the prosecutor and conferences with the trial judge. Under the agreement reached between the prosecutor and the defense, Selikoff pleaded guilty to one count of grand larceny in the second degree in full satisfaction of the three indictments relating to the real estate deal and to one count of obscenity in the second degree in full satisfaction of the fourth indictment.

At the time the revised pleas were entered the trial judge, directing his comments to the defendant, said:

> I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against

> you. Based upon the results of the conferences and conversations and the fact and representation made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises.

These comments, Selikoff contends, represent an unconditional promise which must be specifically enforced.

After the entry of the guilty pleas, the trial judge presided at the trial of Selikoff's co-defendants. During this trial it became apparent to him that Selikoff's involvement in the real estate swindle was far more extensive than he had earlier believed. Moreover, Selikoff's pre-sentence report indicated that he denied any guilt under any of the indictments under which he was charged. These factors prompted the judge to advise the defendant a week before sentencing that his views of the necessity of incarceration had changed and an opportunity would be afforded for Selikoff to withdraw his guilty pleas. At sentencing the judge noted that the court had earlier been unaware of the extent of Selikoff's participation in the real estate scheme. Upon reconsideration in light of additional information, the court informed the defendant that good conscience and the interests of justice required the court to change its views regarding the need for defendant's incarceration. Selikoff was given an opportunity to withdraw his guilty pleas and reinstate his original pleas of not guilty.

Selikoff refused the judge's offer to vacate the guilty pleas. Instead, with the advice of counsel, he chose to affirm those pleas and insisted that he had an absolute right to be sentenced as promised when those pleas were accepted. When Selikoff again affirmed his guilty pleas he was sentenced to a maximum of five years imprisonment on the grand larceny plea and fined on the obscenity plea.

Defendant, asserting a right to specific performance, appealed his sentence. The Appellate Division and the New York Court of Appeals affirmed the trial court. *People v. Selikoff*, 41 App. Div. 376, 343 N.Y.S.2d 387 (2d Dept. 1973), *aff'd*, 35 N.Y.2d 227, 360 N.Y.S.2d 623, 318 N.E.2d 784 (1974). The United States Supreme Court denied defendant's petition for a writ of certiorari. *Selikoff v. New York*, —— U.S. ——, 95 S. Ct. 806, 42 LE2d 822 (1975). A writ of habeas corpus was then sought pursuant to 28 U.S.C. §2254 on the ground that the trial judge's failure to fulfill his "unconditional promise" denied defendant due process of law.

The district court found that the judge's representations at the time the guilty pleas were accepted reasonably led the petitioner to believe that no imprisonment would be imposed. The court, however, did not find that due process mandated fulfillment of the petitioner's expectations and therefore did not order specific performance. Instead, it held that due process required the trial judge to vacate the guilty pleas *sua sponte*, thereby permitting Selikoff to plead anew. 393 F. Supp. 48 (S.D.N.Y. 1975). We disagree.

Resolution of criminal cases by agreement between the prosecutor and defendant, and with the concurrence of the court, is "an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). In petitioning the district court for a writ of habeas corpus the defendant did not seek the vacation of his guilty pleas. At all times the defendant has stood by those pleas; the only question presented to the district court was the validity of sentence. While there is no absolute right to have a guilty plea accepted, *Santobello*, 404 U.S. at 262, *North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970), *Lynch v. Overholser*, 369 U.S. 705, 719 (1962), the trial judge's discretion in accepting a guilty plea should not be overturned unless such plea or its acceptance by the court is constitutionally infirm. The defendant claimed no such infirmity as to his pleas; the infirmity alleged in his petition related only to sentence. Even after Selikoff was informed that imprisonment would be a consequence of pleading guilty he voluntarily chose to affirm his guilty pleas. The district court was in error in ordering a *sua sponte* vacation of validly entered and validly accepted guilty pleas.[1]

The relief the defendant sought before the district court — specific performance of the trial judge's sentence representations — was predicated on the assertion that those representations constituted an unconditional promise. We reject this contention.

1. The authority of a trial judge to vacate a validly accepted guilty plea *sua sponte* over the objections of the defendant has been denied by several New York cases. See *People v. Damsky*, 47 App.Div.2d 822, 366 N.Y.S.2d 13 (1st Dept. 1975), *People v. Griffith*, 43 App.Div.2d 20, 349 N.Y.S.2d 94 (1st Dept. 1973), *Sekaloff v. Hogan*, 41 App.Div.2d 815, 342 N.Y.S.2d 417 (1st Dept. 1973).

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The legislature of New York has, by statute, denied trial judges the authority to make any unconditional sentence promises to a defendant convicted of a felony before a pre-sentence investigation has been conducted and the court has received a written report. Specifically, section 390.20[1] of the New York Criminal Procedure Law (McKinney 1971) provides:

> In any case where a person is convicted of a felony, the court must order a pre-sentence investigation of the defendant and *it may not pronounce sentence until it has received a written report of such investigation.* (Emphasis added).

The trial judge was thus precluded, as a matter of law, from making any unconditional promise to Selikoff at the time his guilty pleas were accepted by the court. In the instant case, moreover, the trial judge specifically noted that his sentence representations were predicated upon "the fact and representation made to the court." Implicitly, then, the court conditioned any promises on the accuracy of the information before it and reserved final determination of sentence until the pre-sentence report was received.

Even though the trial judge may not have "unconditionally promised" defendant that there would be no incarceration, defendant alleges reliance on the judge's statements. Those statements failed explicitly to call the defendant's attention to the necessarily tentative status of the sentencing projections. Whether this failure justified defendant's reliance under the

objective tests imposed when a defendant seeks to withdraw a guilty plea. *Mosher v. LaVallee*, 491 F.2d 1346 (2d Cir.), *cert. denied*, 416 U.S. 906 (1974), *United States ex rel. Curtis v. Zelker*, 466 F.2d 1092 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973), is immaterial to determination of this appeal. The defendant has already been accorded the relief to which he was entitled since he has been allowed to replead. If the defendant's pleas were in any way induced by reliance on the trial judge's statements, the opportunity to replead fully remedied any due process deprivations stemming from such inducement.

The defendant seeks to impose principles of contract upon the plea bargaining process. Such principles, borrowed from the commercial world, are inapposite to the ends of criminal justice. High among those ends are the protection of the public from criminal behavior and the protection of the criminal defendant from indiscriminate punishment. New York seeks to achieve both these ends by requiring the preparation of a pre-sentence report. That report contains an analysis of information "with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits." N.Y. CPL §390.30[1] (McKinney 1971). It is only after receipt of this information that the trial judge can intelligently fashion the sentence appropriate for the particular individual before him.

Justice would be disserved by forcing the State to fulfill Selikoff's expectations by blind application of the contractual

BLEED THROUGH

remedy of specific performance to plea bargaining. Rather, when a guilty plea is induced by an unfulfilled promise, the particular circumstances must be examined to determine the appropriate remedy. In *Santobello*, the Supreme Court expressly left it within the discretion of the State court to decide whether the circumstances of a case require that a plea bargain be specifically enforced or require instead that an opportunity to withdraw the plea be granted. *Santobello v. New York*, 404 U.S. 257, 263 (1971). Here the trial judge determined that justice was best served by the latter course and this determination was affirmed by the highest court of New York. Absent a showing of prejudice, due process does not require the intervention of this court to disturb that discretionary judgment. *Mosher v. LaVallee*, 491 F.2d 1346 (2d Cir.), *cert. denied*, 416 U.S. 906 (1974). See ABA Standards, Relating to the Administration of Criminal Justice, Pleas of Guilty §3.3(b) (1968).

The judgment of the district court is reversed.

ORDER OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of October one thousand nine hundred and seventy-five.

Present:

HON. J. JOSEPH SMITH

HON. PAUL R. HAYS

HON. THOMAS J. MESKILL
Circuit Judges,

United States ex rel. Sheldon Selikoff,

Petitioner-Appellee

v.

Commissioner of Correction of the State of New York,

Respondent-Appellant,

BLEED THROUGH

Order of United States Court of Appeals

District Attorney of Westchester County,

Intervenor.

75-2085

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk

s/ Vincent A. Carlin
Chief Deputy Clerk

ORDERS OF THE UNITED STATES COURT OF APPEALS DENYING PETITION FOR A REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of November, one thousand nine hundred and seventy-five.

Present:

HON. J. JOSEPH SMITH,

HON. PAUL R. HAYS,

HON. THOMAS J. MESKILL,

Circuit Judges.

Docket No. 75-2085

UNITED STATES ex rel. SHELDON SELIKOFF,

Petitioner-Appellee,

v.

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent-Appellant.

BLEED THROUGH

Orders of the United States Court of Appeals Denying Petition for a Rehearing

THE PEOPLE OF THE STATE OF NEW YORK,

Intervenor.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-sixth day of November, one thousand nine hundred and seventy-five.

Docket No. 75-2085

UNITED STATES ex rel. SHELDON SELIKOFF,

Petitioner-Appellee,

Orders of the United States Court of Appeals Denying Petition for a Rehearing

v.

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

Respondent-Appellant.

THE PEOPLE OF THE STATE OF NEW YORK,

Intervenor.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

BLEED THROUGH

FILED
MAR 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75—1187

UNITED STATES OF AMERICA, ex rel. SHELDON SELIKOFF,

Petitioner,

against

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,

and

THE PEOPLE OF THE STATE OF NEW YORK,

Intervenor,
Respondents.

BRIEF OF INTERVENOR

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By: JANET CUNARD BROWN
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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75—1187

United States of America, ex rel. Sheldon Selikoff,

Petitioner,

against

Commissioner of Correction of the State of New York,

and

The People of the State of New York,

Intervenor,
Respondents.

BRIEF OF INTERVENOR

Question Presented

When a defendant enters a negotiated plea of guilty, and the judge cannot fulfill his sentence promise, is the defendant entitled to more than an opportunity to withdraw his plea of guilty?

Facts

On May 8, 1972 trial commenced on Indictment No. 997/70 which charged the defendant and several co-defendants with various crimes arising out of a complicated real estate swindle.[1]

On May 12, 1972, the defendant appeared before Honorable George D. Burchell and entered a plea of guilty to one count of Grand Larceny in the Second Degree in full satisfaction of three indictments charging seventeen counts of Grand Larceny in the First Degree, sixteen counts of Grand Larceny in the Second Degree, three counts of Conspiracy in the Third Degree and two counts of Criminal Facilitation in the Second Degree. At that time the judge stated that based upon the facts and representations made by the District Attorney's office and counsel for the defendant and known to him, it was his opinion that no incarceration was required (A3).

Subsequent to the plea and prior to sentence, the judge discovered that he "was not aware, nor . . . advised as to the extent of (the defendant's) participation involving the fraudulent scheme which was the basis of the grand larceny in the second degree" (A8), and that the defendant's participation was "not peripheral, subordinate or minor, but rather major as a principal participant in the fraud" (A8-9). As a result he "(could) not in good conscience and in the interests of justice keep the promise . . . to no incarceration" (A9). The judge so advised the defendant on August 9, and gave him until August 16 to decide whether he wanted to withdraw his plea or proceed with sentence, the sentence being imprisonment. On Au-

---

[1] By a separate indictment (606-70), the defendant was charged with obscenity and related offenses. As he entered a separate plea to that indictment and was fined $1,000 even though he was offered an opportunity to withdraw his plea and filed a notice of appeal, that judgment is not germane to the issues raised.

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gust 16, the defendant refused the offer to withdraw his guilty plea. He was then sentenced to an indeterminate term of up to five years.

The defendant's conviction was affirmed by the Appellate Division of the Supreme Court of the State of New York (*People* v. *Selikoff*, 41 AD 2d 376, 343 NYS 2d 387 (2d Dept., 1973)) and the New York Court of Appeals (*People* v. *Selikoff*, 35 NY 2d 227, 360 NYS 2d 623 (1974)) and a petition to the Supreme Court of the United States for a writ of certiorari denied (*Selikoff* v. *New York*, 419 US 1122, 42 LEd 2d 822, 95 SCt 806 (1975)).

The defendant then sought federal habeas corpus relief. By order of Honorable Dudley B. Bonsal dated April 21, 1971, upon a finding that the trial judge should have vacated the plea sua sponte, a writ of habeas corpus was issued (393 FS 48 (S.D.N.Y. 1975)).

On appeal, the judgment of the District Court was reversed (—— F2d —— (2d Cir. 1975)) and a petition for rehearing and a petition for rehearing containing a suggestion that the action be reheard in banc, denied.

POINT I

It is a matter of discretion lying solely in the State courts to determine the remedy when a sentence promise is to be undone.

The Supreme Court in *Santobello* v. *New York*, 404 US 257, 30 LEd 2d 427, 92 SCt 495 (1971), clearly enunciated two principal propositions relating to "plea bargaining":

1) "There is . . . no absolute right to have a guilty plea accepted."

2) Once a guilty plea is accepted, there must be "specific performance of the agreement" *or* the defendant must be given the "opportunity to withdraw his plea of guilty," in the discretion of the state court.

There was no preference stated for either alternative and the choice was left solely to the state courts in the exercise of their discretion.

> "The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be re-sentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty."

The New York Court of Appeals has now held that the discretion as a matter of state law is to be exercised by the sentencing court. (*People* v. *Selikoff*, 35 NY 2d 227, 360 NYS2d 623 [1974]). There is no unique fact in the instant case which would mandate action without the exercise of discretion. Thus, as this Court and the New York Court of Appeals have held that the remedy, to be determined by the trial judge in his discretion, is either the opportunity to withdraw the plea or specific performance of the agreement, the Court below properly reversed the judgment of the District Court which had granted a writ of habeas corpus, and upheld the exercise of discretion by the trial judge.

POINT II

There was no violation of the defendant's rights.

As a matter of state law a sentence promise made prior to the obtaining of a pre-sentence report cannot be binding (*People* v. *Selikoff, supra*). This is a reasonable position taken by the legislature and courts of the State to ensure that prior to the imposition of sentence, the judge is aware of all information which is necessary to enable him

to impose a just sentence. As there is a reasonable independent state ground, there is no federal constitutional issue presented.

A defendant has a right to a jury trial to determine his guilt or innocence and the State has a right to a trial to determine a defendant's guilt or a plea of guilty as charged (220.60[1], Criminal Procedure Law). The defendant may waive his right and enter a plea of guilty or ask the district attorney and the court to allow him to plead guilty to less than the entire indictment or to a lesser included offense in satisfaction of the charges pending against him (220.10[4][5], CPL). With the permission of the court and the consent of the district attorney, a compromise plea may be entered (220.60[3], CPL).

When the plea is entered based upon a representation as to what the sentence will be, and the judge later finds that that sentence would be inappropriate, the defendant must be given the opportunity to withdraw his plea or the sentence indicated must be imposed, in the discretion of the trial judge. As in the instant case, the compromise plea usually severely limits the possible sentence as compared to that permissible under the original charges. Thus, if the trial judge decides that specific performance of the sentence representation would be inappropriate and gives the defendant the opportunity to withdraw his plea, the defendant has the option of letting the plea stand, thus limiting the sentence, or withdrawing his plea and standing trial on the original charges.

While a defendant is protected from being twice put in jeopardy for the same offense, jeopardy does not attach if a plea of guilty is "nullified by a court order which restores the action to its pre-pleading status" (40.30[3], CPL). Thus, when a plea of guilty is vacated, the other charges that were taken into consideration are revived and the defendant may properly be tried on the entire indictment (*People* v. *Rice,* 25 NY 2d 822, 303 NYS2d 677 [1969]).

> "If the state court decides to allow withdrawal of the plea, the petitioner will, of course, plead anew to the original charge on two felony counts."
>
> *Santobello* v. *New York, supra,* footnote 2.

When the sentencing court exercises its discretion it must always consider whether if the plea is withdrawn, the parties can be returned to the status obtaining before the plea.

> "If the promised sentence was the inducement for the guilty plea, defendant is entitled to have the promise fulfilled or, if the arrangement is to be undone, the People and defendant are entitled to be restored to the status obtaining before the plea."
>
> *People* v. *Di Giacomo,* 40 AD 2d 689, 336 NYS2d 260 (1972).

Thus, when for some reason the case cannot be tried, or "(circumstances) arise which, in justice, would require granting a defendant the consideration he was advised he would receive at the time of his guilty plea", the state court will order imposition of the indicated sentence (*People* v. *Esposito,* 32 NY2d 921, 347 NYS2d 70 [1973]; *People* v. *Selikoff, supra*).

In the instant case, by withdrawal of the plea, it was possible to place the parties in the *status quo ante.*

> "The record does not disclose any change of position by defendant other than what occurs on any plea of guilty." (*People* v. *Selikoff, supra,* 239).

The trial judge thus, as was his prerogative in the exercise of discretion, gave the defendant an opportunity to withdraw his plea and when he refused to do so, imposed a sentence of imprisonment.

A sentence commitment in the case of a felony is as a matter of law contingent until after receipt of the probation report.

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There cannot, as contended by the defendant, be any absolute sentence promise by the Court at the time of the acceptance of a guilty plea as such would be violative of the statutory scheme. Prior to imposing sentence on a felony conviction, the court must order a pre-sentence investigation "with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education and personal habit" and may not pronounce sentence prior to receiving a written report of such investigation (390.20[1]; 390.30[1], CPL). While such report may be made prior to conviction (380.30[3], CPL), the volume of work assigned to understaffed probation departments makes such impossible, especially in the case of a defendant released on bail, as extensive time may be consumed in investigation where such is not necessary (i.e.; acquittal; dismissal; misdemeanor conviction (390.20[2]), to the detriment of others already convicted (see: *People ex rel. Weingard* v. *Casscles*, 40 AD 2d 530, 333 NYS2d 973 [1972]; *People* v. *Gibson*, 39 AD 2d 947, 333 NYS2d 104 [1972]). It is thus obvious that the Legislature intended that (a) a lesser plea may be accepted by the court (220.60[3], CPL); (b) a tentative sentence commitment may be made (no prohibition); (c) a complete pre-sentence investigation must be made prior to sentence (390.20[1]; 390.30[1], CPL); (d) if the voluntariness of a plea is not clear to the court, the court in its discretion may permit it to be withdrawn (220.60[4], CPL); (e) if the plea is not withdrawn, the court must impose sentence (380.20, CPL); (f) the sentence must be imposed with regard to its deterrent influence, the rehabilitation of the defendant and the protection of the public (1.05[5], PL).

Thus after having received the probation report in which the defendant asserted his innocence and having presided over a trial involving co-defendants and co-conspirators during which the extent of the defendant's participation

was for the first time fully revealed, the judge determined that he could not "in good conscience and in the interests of justice keep the promise (of) no incarceration". The judge then offered to put the defendant in the *status quo ante*. The defendant, of course, did not wish to subject himself to the term of imprisonment which the plea of not guilty permitted and thus attempted to force the judge to impose a sentence of non-imprisonment.

POINT III

The judgment entered.

It is not contended that an admitted felon such as the defendant cannot rely upon representations by a court. It is clear, however, that a convicted felon cannot have his hopes and desires override the sound exercise of discretion by the court. A defendant has no "contract" for a particular type of sentence and an arrangement as in the instant case represents as a matter of law a contingent arrangement until such time as it is confirmed by the judge subsequent to his review of the pre-sentence report by the actual imposition of sentence. To hold otherwise would be to prevent judges from ever indicating a sentence predisposition, which would have the result of unnecessarily prohibiting pleas in those great majority of cases where the predisposition conforms to the final conclusion. Given the present realities, it would result in intolerable calendar congestion. Lest it be argued however, that no such condition was expressly affirmed at the time of original plea, it should be pointed out that this was wholly unnecessary as such a conditional nature of the sentence commitment is of necessity implied.

Further, there is no indication that the defendant has been prejudiced or has changed his position in reliance upon the plea (as might have been the case had he testified as a State's witness subsequently). Even if there had

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been such reliance, courts of justice are capable of protecting the defendant's interest in a less drastic manner than granting that type of inappropriate specific performance which would render the solemn exercise of judicial discretion in sentencing a robot-like compliance with the demands of the convict. The court could take judicial notice of the great and broad experience of defendant's counsel at the time of plea, to insure itself that there was not unreasonable reliance upon the absolute nature of the plea.

The judge at the time of accepting the guilty plea having advised the defendant that based upon the facts known to him, no imprisonment would be necessary; felt that that statement might have induced the defendant to enter the guilty plea. He therefore, in the exercise of his discretion, gave the defendant an opportunity to return to his prior position where he would have the only rights he ever had, namely to proceed to trial, to enter a plea of guilty as charged or to ask the court and the prosecutor to permit him to plead to a lesser charge.

The defendant having elected to decline the offer to withdraw his guilty plea was properly sentenced to an indeterminate term of up to five years. He may not now change his mind.

POINT IV

A direction to vacate the plea *sua sponte* would be improper.

Selikoff does not and has not ever sought vacation of his plea of guilty[3] and has in fact been adamant in his desire to let it stand. The defendant, represented by probably the most experienced defense attorney in Westchester

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[3] Except for the statement on p. 15 of the instant petition where he states: "We maintain that the plea of guilty must be vacated whether it is *sua sponte* or otherwise."

County, when offered an opportunity to withdraw the pleas, through counsel, stated: "we do not wish to withdraw those pleas . . . we have an absolute right not to withdraw them and to permit them to stand" (A10). The defendant's position did not change on appeal and in his brief on appeal (p. 20) to the New York Court of Appeals he stated:

> "Since it is apparent that the plea of guilty herein was the equivalent of a jury verdict of guilty, the Trial Court had no right, without an appropriate motion being made, to vacate that on its own."

and sought not to have the plea vacated but only:

> "the judgment of conviction, so far as the five year sentence imposed, should be reversed and incarceration should be eliminated."

In the petition for a writ of habeas corpus which is the basis of the instant petition, the defendant did not contend that his plea of guilty should be vacated but merely that he should be relieved of the sentence of incarceration.

The withdrawal of a plea of guilty and the declaration of a mistrial are analogous. Over the objection of the defendant, the court cannot order his plea withdrawn (*Sekaloff* v. *Hogan*, 41 AD 2d 815, 342 NYS 2d 417 (1973); *People* v. *Griffith*, 43 AD 2d 20, 349 NYS 2d 94 (1973), or a mistrial (*Matter of Ferlito* v. *Judges of County Court*, 31 NY 2d 416, 340 NYS 2d 635 (1972); *United States* v. *Jorn*, 400 U.S. 470, 27 LEd 2d 543, 91 SCt 547 (1971)), absent manifest necessity (*United States* v. *Dinitz*, —— U.S. ——, 44 LW 4309). A plea with which the court, district attorney and defendant (surrounded by all necessary safeguards including competent counsel) are satisfied should not be withdrawn by the court *sua sponte*.[4] Unless

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[4] While the District Court found such to be in the best interest of the defendant such is, of course not the case. The defendant by his plea was able to limit his sentence liability to seven years. Upon vacation of the plea, the defendant faces a maximum sen-

(footnote continued on following page)

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waived by the defendant on a subsequent plea or trial, the defendant would have available a plea of double jeopardy (*People* v. *Soules*, 38 AD 2d 637, 326 NYS 2d 894 (1971)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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By: JANET CUNARD BROWN
Assistant District Attorney
of Counsel

(footnote continued from preceding page)

tence on each count, sentences which may run consecutively. He may not enter a guilty plea to less than all the counts as charged unless the district attorney consents and the court accepts the plea. Upon a new attempt to plead guilty to one count, the defendant may be unsuccessful and may be sentenced to a greater term of incarceration.

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APPENDIX

Transcript of Proceedings Before Burchell, J. Dated May 12, 1972 (Plea).

COUNTY COURT—PART III

COUNTY OF WESTCHESTER—STATE OF NEW YORK

Indictment Number 997/70

PEOPLE OF THE STATE OF NEW YORK

—against—

SHELDON SELIKOFF

Defendant

May 12, 1972
County Court House
White Plains, New York

BEFORE:

HON. GEORGE D. BURCHELL
County Court Judge

APPEARANCES:

CARL A. VERGARI, District Attorney
JOSEPH K. WEST, SR., Ass't D.A.
ALFRED CHRISTIANSEN, A.D.A.
County Court House
White Plains, New York

VINCENT W. LANNA, Esq.
50 Riverdale Avenue
Yonkers, New York
For: SHELDON SELIKOFF—*Deft.*

ROSE A. IMPALLOMENI
Official Court Reporter

Transcript of Proceedings Before Burchell, J.
Dated May 12, 1972 (Plea).

Mr. West: You are Sheldon Selikoff?

Sheldon Selikoff: That is correct.

Mr. West: And you are represented in Court this morning with your attorney Mr. Lanna?

Sheldon Selikoff: Yes, sir.

Mr. West: Judge, if it please the Court I believe this defendant has an application to make. Mr. Lanna.

Mr. Lanna: If Your Honor please, this defendant is now desirous under indictment 997/70 of withdrawing his previously entered plea of not guilty under the first count of that indictment and to enter in its place instead a plea of guilty to the first count as charged in full satisfaction of that entire indictment. In addition under indictment number 606/70, this defendant is also desirous of withdrawing his previously entered plea of not guilty under the second count of that indictment and entering in its place instead, a plea of guilty to that second count in full satisfaction of indictment 606/70. Now both of the pleas of which I have just referred to are not only in satisfaction of these two indictments namely 606/70 and 997/70, but in addition are in full satisfaction of indictment numbers 998/70 and 999/70.

Mr. West: May I proceed Your Honor.

The Court: Yes.

Mr. West: Mr. Selikoff, is this plea voluntarily made by you this morning?

Sheldon Selikoff: Yes.

Mr. West: Both of these pleas, is that correct?

Sheldon Selikoff: Yes sir.

Mr. West: Have you had time to consult with Mr. Lanna prior to making these pleas?

Sheldon Selikoff: Yes sir.

Mr. West: Do you understand sir that by your plea of guilty to Grand Larceny in the second degree under indictment number 997/70 you are pleading guilty to a class "D" felony.

BLEED THROUGH

Transcript of Proceedings Before Burchell, J.
Dated May 12, 1972 (Plea).

Sheldon Selikoff: Yes sir.

Mr. West: And do you understand that that plea that you are entering this plea today just the same as if you had a trial and had been found guilty of this class "D" felony?

Sheldon Selikoff: Yes sir.

Mr. West: Do you sir freely and voluntarily admit, that in this county on or about January 24, 1968, you stole from one J. Radley Metzker property to wit current monies of the United States of America of the aggregated value of over $1,500.

Sheldon Selikoff: Yes sir.

Mr. West: And now have you been threatened or coerced to induce this plea?

Sheldon Selikoff: No sir.

Mr. West: Do you sir withdraw all motions heretofore made with respect to all indictments now pending against you?

Sheldon Selikoff: Yes sir.

Mr. West: Have been any promises made to you sir by the Westchester County District Attorney's Office.

The Court: At this point Mr. West I would like to place on the record, Sheldon Selikoff, I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against you. Based upon the results of the conferences and conversations and the fact and representation made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises. Do you understand that?

Sheldon Selikoff: Yes sir.

Mr. West: Now sir, have there been any other promises made to you by the Westchester County District Attorney's office?

Transcript of Proceedings Before Burchell, J.
Dated May 12, 1972 (Plea).

Sheldon Selikoff: No sir.

Mr. West: Have there been any promises made to you by Mr. Lanna?

Sheldon Selikoff: No sir.

Mr. West: Have you been promised anything by the Probation Department of this County?

Sheldon Selikoff: No sir.

Mr. West: And now with respect to your plea of guilty under indictment number 606/70 to the crime of obsenity in the second degree, is that plea voluntarily made by you?

Sheldon Selikoff: Yes sir.

Mr. West: Have you been threatened or coerced to induce that plea?

Sheldon Selikoff: No sir.

Mr. West: Have you had time to consult with Mr. Lanna with respect to this plea?

Sheldon Selikoff: Yes sir.

Mr. West: And do you sir freely and voluntarily admit that in the Town of Greenburgh, this County and State, on or about August 9, 1970, knowing its contents and character, you did promote and possess with the intent to promote obscene material by exhibiting a motion picture film depicting the act of sexual intercourse to one Rita Feinburg.

Sheldon Selikoff: Yes sir.

Mr. West: Do you understand sir that by rendering this plea, it is just the same as if you had a trial and had been found guilty of this class "A" misdemeanor?

Sheldon Selikoff: Yes sir.

Mr. West: Have there been any promises made to you with respect to this plea?

Sheldon Selikoff: No sir.

The Court: What I said Sheldon Selikoff in regard to the plea on the other indictment goes with this plea also. Do you understand that?

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Transcript of Proceedings Before Burchell, J.
Dated May 12, 1972 (Plea).

Sheldon Selikoff: Yes sir.

The Court: I will not answer as to what other punishment I shall impose, I will reserve to that.

Mr. West: Have there been any other promises made to you sir by anyone?

Sheldon Selikoff: No sir.

Mr. West: Judge based upon all the facts and circumstances of this case and based further on the fact that this defendant has no prior felony conviction to our knowledge, we would move for the consolidation of indictment 998 and 999 with 997, for the purpose of the plea that was entered under 997/70. We would ask the court to advise his defendant of his rights and to accept this plea.

The Court: Well Sheldon Selikoff before the court can accept your offered plea you must be advised that if you have been previously convicted of any crime or even an offense that that fact may be and if that fact is established in connection with your plea of guilty on the indictment which you are being arraigned here, that this may result in additional or different punishment than that as prescribed by law. Do you understand that sir?

Sheldon Selikoff: Yes.

The Court: With that understanding do you still wish to offer this plea of guilty?

Sheldon Selikoff: Yes sir.

The Court: The pleas have been accepted. Sentence will be set down. Mr. Lanna do you have any problem with your military service?

Mr. Lanna: Your Honor may I suggest the 19th of June?

The Court: Sentence will be the 19th of June.

Mr. West: May the record reflect that the plea is accepted during trial your Honor?

The Court: Yes sir.

Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

COUNTY COURT—WESTCHESTER COUNTY

Indictment Nos. 606-70 997-70

Sentence

THE PEOPLE OF THE STATE OF NEW YORK

against

SHELDON SELIKOFF,

Defendant.

August 16, 1972
Part 3
White Plains, New York

Before:

HON. GEORGE D. BURCHELL, Judge.

APPEARANCES:

CARL A. VERGARI, Esq.
Attorney for the People
District Attorney of Westchester County
By: JOSEPH K. WEST, Esq.
Senior Assistant District Attorney

VINCENT W. LANNA, Esq.
Attorney for the Defendant
50 Riverdale Avenue
Yonkers, New York

PATRICK McKAY
Court Reporter

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Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

Mr. West: May I proceed, Your Honor?

The Court: Yes.

Mr. West: You are Sheldon Selikoff; is that correct?

The Defendant: Yes, sir.

Mr. West: You are represented in Court this morning by your attorney, Mr. Lanna?

The Defendant: Yes, sir.

Mr. West: Judge, if it please the Court, this defendant having heretofore plead guilty under Indictment No. 606 of 1970 to obscenity in the second degree and having also plead guilty under Indictment No. 997 of 1970 to grand larceny in the second degree, the People will move for sentence.

Court Clerk: Sheldon Selikoff, do you have any legal cause to show why judgment should not now be pronounced against you?

The Defendant: No.

Court Clerk: Mr. West, do you have any recommendation to make?

Mr. West: No, Your Honor, the People have no recommendation.

Court Clerk: Mr. Lanna, would you like to address the Court?

The Court: If I may make a statement, Mr. Lanna, at this point, if I may?

Mr. Lanna: Yes, sir.

The Court: Sheldon Selikoff, on May 12th, 1972, upon the recommendation of the District Attorney, you were permitted to plead guilty to one count of grand larceny in the second degree, the first count of Indictment No. 997 of 1970, which contained six counts of grand larceny in the second degree and one count of conspiracy in the third degree. This plea to the first count of that indictment was in full satisfaction of that indictment as well as Indictment Nos.

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998 of 1970 and Indictment No. 999 of 1970. Indictment No. 998 of 1970 contained two counts of grand larceny in the second degree, two counts of conspiracy in the third degree against you. Indictment No. 999 of 1970 contained twenty-five counts against you, seventeen of which were for grand larceny in the first degree, and eight of which were for grand larceny in the second degree. You were also, on the recommendation of the District Attorney, allowed to plead guilty to the second count of Indictment No. 606 of 1970; namely, to the crime of obscenity in the second degree. That was to cover three other counts of obscenity in the second degree, one count of obscenity in the first degree, and one count of sexual abuse in the third degree, and one count of criminal solicitation in the second degree, and one count of consentual sodomy. At the time that such pleas were entered, this Court was not aware, nor was it advised, as to the extent of your participation involving the fraudulent scheme which was the basis of the grand larceny in the second degree of Indictment No. 997 of 1970 to which you plead guilty.

This Court, therefore, based upon the information it then had, informed you at the time you pleaded guilty that it did not believe that a sentence calling for your incarceration was required in the interest of justice.

Subsequent to this expression of this view, however, this Court presided at the trial of the several co-defendants named in the same indictment with you, which trial lasted for some six weeks. From the evidence adduced on behalf of the People's case on this trial, it appeared to this Court that your participation in the fraudulent scheme which was the basis of the larceny alleged in this count of the indictment, as well as in the other larcenies alleged in the other indictments, Indictment 998 of 1970 and 999 of 1970, involving thousands of dollars, was not peripheral,

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subordinate or minor, but rather major and as a principal participant in the fraud.

In light of these facts and circumstances, the Court feels that at this time that it cannot in good conscience and in the interests of justice keep the promise here to no incarceration.

Furthermore, it appears from your pre-sentence report filed by the Probation Department that you deny any participation in any fraud by which sums of money were extracted from money lenders.

Again, in regard to the indictment charging you with sexual impropriety, you, according to the pre-sentence report, deny any guilt in any such acts and claim that you are a victim of some persecution.

Now, in view of these circumstances and in the interests of fairness and in the belief that the ends of justice will be served, this Court believes it should allow you to withdraw your pleas of guilty to both of the indictments and have your original plea of not guilty thereto reinstated, and that you be given your day in Court to contest the charges of the People.

Accordingly, Mr. Selikoff, this Court hereby grants you the opportunity to withdraw your pleas as heretofore made as to the two indictments.

Now, what is the decision?

Mr. Lanna: If Your Honor please, with all due respect to the Court, Mr. Selikoff is not desirous of withdrawing his pleas of guilty as heretofore entered on May 12th, 1972 during the course of the trial under Indictment No. 997 of the year 1970. Those pleas being entered to both that indictment and Indictment No. 606 for the year 1970 in full satisfaction of those indictments and also Indictments No. 998 and 999 for the year 1970.

May I state for Your Honor although I am not aware of what is in the pre-sentence report except to what Your

Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

Honor has already indicated, that we predicate our refusal, first, on the ground that we do not wish to withdraw those pleas. Secondly, I believe that legally, and despite what Your Honor may extract from that pre-sentence report, we have an absolute right not to withdraw them and to permit them to stand. I think the authority along those lines is the case of North Carolina against Alford, 400 US 25, which was also followed in People against Fooks, 21 NY 2d 338, and People v. Creazzo, 39 App. Div. 2d 748, and of course, Alford, Your Honor undoubtedly knows, dealt with a situation where it was the defendant who was desirous of withdrawing a plea of guilty and the Court in North Carolina wouldn't permit it, and they went up to the U.S. Supreme Court. The Supreme Court, in substance, said that there may be many reasons why a person who professes his innocence may yet wish to enter a plea of guilty to particular charges, perhaps so similar to the person who is gun shy and does not wish to go into combat, similar to the person who does not wish to expose himself to the possibility of a conviction with an onerous sentence which might be imposed. Therefore, even though he professes his innocence, he would rather play it safe, so to speak.

However, there is yet another ground wherein this case Mr. Selikoff has a right to continue his plea. As Your Honor undoubtedly recalls, we had rather extensive discussions in chambers during the course of the trial under indictment No. 997 for the year 1970, at which time I believe several representatives of the District Attorney's Office were there: Mr. West, who was the Chief Trial Counsel, Mr. Christiansen, who was assisting him and at one stage or another we had Mr. Moley, who I believe is in charge of that Trial Division, if that is his proper title, and, of course, Mr. Thomas Facelle, who is Chief Assistant District Attorney of this County. We discussed with

you the circumstances surrounding this indictment as well as indictment 998 and 999 for the year 1970, and it's my recollection that in addition to myself, the attorney of record for Mr. Selikoff, I being trial counsel, as Your Honor might recall, Mr. Scancarelli and I both informed Your Honor that although we felt Mr. Selikoff was not under Indictment 997 of the year 1970 truly criminally implicated in it, we were most concerned regarding Indictments 998 and 999 for the year 1970, and in addition to that fact we pointed out to you Mr. Selikoff's background, that he had a prior problem in the Federal Courts out of Newark, New Jersey district, and it's my recollection that the District Attorney and his representative or representatives, depending upon which time we are speaking of, were all there and they certainly were aware of what their case file had as regards whatever Marx's testimony was going to be and they were willing to accept these pleas and did state at the time that they would have no recommendation as to sentence.

The Court: If I may interrupt you, Mr. Lanna? Were you present during the trial of the co-defendants?

Mr. Lanna: I sat through it from time to time.

The Court: In none of these discussions prior to the entering of the pleas was there any discussion about the defendant, specifically, this defendant's role, if any, in the alleged crimes before me.

Mr. Lanna: That is true. In fact—

The Court: The District Attorney may have known about it but I was not advised.

Mr. Lanna: I have to say to you, I recall we did discuss with you the fact that we were not as concerned with his role under Indictment 997 as we were under 998 and 999 of 1970, which, of course, regardless of the outcome of 997, might very well have led into those subsequent

indictments and to the trial of those subsequent indictments. Now, I think Your Honor must keep in mind that when a defendant negotiates a plea he, of course, does it with the salient thought in mind and that is to negotiate the best possible plea he can get. So that he can get out from under. This defendant had four indictments and having been found guilty under any which one of these, just speculating to that, it could expose him to very serious penalties, and assuming arguendo, even though he was successful in defending three of them.

Again I say that this was brought to the attention of the Court, if not expressly, I think implicit. I think this was all part of the plea bargaining, in addition to the fact that this defendant also had undergone considerable expense in this matter which I first believe was started in February of 1970 in this Court before Judge Sullivan, at which time I think it ran through seven or eight or ten days listening to tapes and it was aborted because of newspaper publicity. We again started and took up perhaps another week or ten days of not only tapes but the selection of the jury.

The Court: I had nothing to do with any prior motions or applications made in this case.

Mr. Lanna: I agree.

The Court: I was assigned this trial, and that was my function.

Mr. Lanna: What I am trying to convey to the Court is that these are calculated decisions by all persons concerned. These are expensive decisions, and at this time the defendant feels that under that posture he has an absolute right to stand with his plea.

Now, if I may just quote for Your Honor those decisions and the law which I think is applicable, and with all due respect, I feel that Your Honor's promise would be binding, that is, the promise that was made in May of 1972. The case I would like to quote is Santobello—

Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

Mr. West: February of '72.

Mr. Lana: Mr. West has just corrected me, '72. In Santobello against New York, I don't have the official citation but it's 30 Law Edition 2nd 427—

The Court: I have read that case.

Mr. Lanna: I am sure, your Honor, you have. But I feel that the principles that apply in the Santobello case dealing with the prosecution rather than a Judge would be equally applicable to the Court in that there we had a promise even though inadvertent it was not kept, and in that case, if I may just quote from Page 433, "This phase of the process of criminal justice and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

Now, in that case it was sent back, it was reversed and sent back, and the Supreme Court suggested one of two remedies: either specific performance or permitting a withdrawal of the plea of guilty.

Now, just recently reported with that the Appellate Division, First Department, ruled also that was the Santobello case, and that is found in 39 App. Div. 2d 654, the Appellate Division said, although the dissenting opinion, the Judge most vehemently said he would have been happy to permit the withdrawal of the plea because evidently Santobello had a very horrible background and would have been in a much worse position if the plea was withdrawn and he permitted to go to trial on a more serious felony, despite that, the majority stated that we are bound by the law of this State under the authority of People against Keehner,

28 App. Div. 2d 559, which was affirmed by 25 NY 2d 884, also People against Chadwick, reported in 33 App. Div. 2d 687, to specific performance once a promise has been made in good faith and even though we might be sorry for it later, as long as there wasn't any false representations and any fraud perpetrated upon anyone, that even later on we might feel perhaps on negotiations or our decision or promise wasn't a good one, we are bound by it.

For those reasons, I feel that this defendant is entitled to specific performance of the promise which was made in May of 1972.

Mr. West: Judge, I would like to be heard briefly. Mr. Lanna, first of all, announces to me that this defendant now wishes to enter into the Alford type of plea whereby I am not guilty but I will plead guilty for various other reasons. During the actual plea taking, I, myself, personally asked this defendant did he freely and voluntarily admit certain things and he stated, yes. In other words, he had admitted his guilt with respect to these two crimes. My office, as Mr. Lanna has pointed out, there were numerous people there and it was our distinct understanding that this defendant would admit his guilt with respect to those two counts, with respect to those two indictments and that was the type of plea we were consenting to.

We are now told that your presentence report does indicate that this defendant now denies any guilt and I cannot say what effect that would have had on my office in consenting to this plea. There have been similar cases where my office has refused to consent to a reduced type plea where the defendant says, "I did not do it but I will plead guilty." So that might have had some effect as to my office saying we would consent to those two pleas.

Further, there was some mention made as to whether or not my office had made known the involvement of this defendant in these crimes and I would merely state that

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we played for the Court a taped conversation as between this defendant and one Jay Marx, and it was our clear understanding from that recording that this defendant was conspiring then with Jay Marx to perpetrate a fraud and to refresh Your Honor's recollection of it, I would only point out that the part where this defendant was alleged to have said on that tape recording, "Maybe you should strap your leg up so you will always walk with the same type limp."

Also, we feel from the actual playing of that tape we had made known to some extent anyway with respect to one incident of this defendant's involvement in the scheme.

The Court: It indicated his involvement, Mr. West, but to the extent—

Mr. West: We feel that there was made here was an actual quid pro quo pact here. This defendant pleaded guilty under Your Honor's statement that he did not feel that he should be incarcerated as a result of these pleas at that time. It would seem to us if Your Honor now having learned more of this defendant's involvement feels that he has to be incarcerated, the fair thing and the just thing would be to return this defendant to the status he was in prior to his plea and to say I cannot live up to what I said, having found out that and the interests of justice dictate something else, I will, therefore, let you, Mr. Selikoff, withdraw your plea. I don't know of anything else that Your Honor could do in the interests of justice.

It's my understanding that Your Honor has offered this defendant his opportunity to withdraw this plea and though I was not here I would like this record to show that this offer was extended to the defendant, I believe some time last week in Court when Your Honor first made it known to this defendant that he would be given the opportunity to withdraw his plea. I would like this record to reflect that he has had that week to actually think about it.

Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

The Court: I expressed myself in Court and I suggested to Mr. Lanna that he consult with his client and give the matter some discussion, having in mind I indicated what my direction was going to be, and that is why we are here today on the adjourned date.

Mr. Lanna: May I just be heard one moment, Your Honor, please?

The Court: I have a jury waiting.

Mr. Lanna: I know, but this is a very delicate issue. As far as Mr. West pointed out that the defendant did admit when he was questioned as to whether or not he had wilfully participated in these crimes, I think that the law has long been since settled. Specifically, when you are dealing with satisfaction of other indictments, that these statements which quite often are made before the Court are made for other purposes such as, the Alford decision, because one wishes to enter a plea for the disposition of a serious number of charges such as certainly was the situation here. If I may add, and I thank Mr. West for pointing out that these tapes were played and certainly those tapes as far as I am concerned were rather damaging to this defendant, despite what he might think, not only that, but Your Honor stated you were relying to some extent more upon Mr. Marx's testimony at the trial.

Well, of course, let me say this: Mr. Marx testified against the remaining co-defendants and he sort of had a field day as to what he was going to say against the defendant Selikoff. You know, it's human nature, especially when you are dealing with confidence people, I think we have to determine that Mr. Marx would like to give the jury the impression that he wasn't really entirely the sole bad guy. I want you to understand the guy who isn't here who I am punching at with the use of mirrors in this room is equally as guilty as I, so don't look at me as I sit on the stand as being the only bad guy. I am only half bad.

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Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

Remember, he wasn't subject to cross examination on behalf of Selikoff. He had sort of a free rein and a field day. I can understand Your Honor's listening to it and perhaps being appalled by it but I also think the Court should have taken that factor into consideration.

With that, again, of course, as Mr. West has pointed out, we've had a week to think about this and we have thought about it a great deal. We feel that we are entitled to specific performance.

The Court: Well, I have reviewed the authorities in this matter and have given the matter serious and deep thought, and I can see my way in only one direction, Mr. Lanna, and I will proceed that way.

As I said, as I understand the procedure, I have to give you this opportunity, Mr. Selikoff, to withdraw your plea or to affirm your plea, and I gather through your attorney that you have decided to affirm your pleas of guilty; is that correct?

The Defendant: Yes, sir.

The Court: In that event, the Court, it appears, has no alternative but to impose the sentence as to each count since, by your plea of guilty, you admit your guilt and based upon the facts and circumstances as ascertained by the Court from its participation in the aforesaid trial and from the information obtained from your pre-sentence report, I am required in the exercise of my responsibility to proceed with your sentence. Before the Court proceeds with your sentence, Mr. Selikoff, do you wish to say anything more to the Court at this time?

The Defendant: No, sir.

The Court: All right. Under all of the facts and circumstances in regard to Indictment No. 606 of 1970, under the plea of guilty to the crime of obscenity in the second degree, a Class A misdemeanor, it is the sentence of this

Court that you pay into the Court a fine of the sum of $1,000 on or before September 1, 1972.

In regard to Indictment 997 of 1970, that plea of guilty to the crime of grand larceny in the second degree, a Class D felony, for which you could receive up to seven years in State's Prison, it is the sentence of this Court that you be sentenced to State Prison for an indeterminate term, the maximum of which shall be five years.

Now, Mr. Lanna, have you any further application to make?

Mr. Lanna: Yes, if Your Honor please—

Mr. West: Prior to that, may I interrupt Your Honor and ask that you advise this defendant of his right to appeal?

The Court: Yes. I advise you of your right to appeal from this sentence of the Court and you have thirty days to do so by filing a Notice of Appeal with our Appellate Division Court. If you wish to appeal and do not have the funds to hire a lawyer to file a required Notice of Appeal, you may apply and ask the Appellate Division if it will appoint an attorney to file the Notice of Appeal for you.

Do you understand your right of appeal?

The Defendant: Yes, sir.

The Court: All right, Mr. West?

Mr. West: Nothing else, Your Honor.

The Court: Mr. Lanna?

Mr. Lanna: If Your Honor please, I would most respectfully request that specifically in view of what has occurred this morning, I think Your Honor will readily agree that certainly this is an appealable issue here and that this defendant be given a stay of execution so that he may have an opportunity to file a notice and a motion in seeking bail pending the appeal. If I may, I am going to ask Your Honor for two or three weeks, as I am leaving tomorrow night for Fort Bragg and I shall not return until

September 2nd. I would ask if you would give this through September the 10th, Your Honor, please? Give me some time in which, not much time, actually, because I won't be here—

The Court: The 10th is a Sunday.

Mr. Lanna: I am sorry. My addition is wrong. That would be the 7th?

The Court: That's a Thursday.

Mr. Lanna: The 8th.

The Court: Yes.

Mr. West: Your Honor, do I understand the purpose of the stay was to allow counsel some time to bring on a motion for bail, what we used to call a Certificate of Reasonable Doubt?

Mr. Lanna: Yes. It's not called a Certificate of Reasonable Doubt anymore. It's an application for bail.

Mr. West: Judge, I leave it up to your discretion.

The Court: I think under the facts and circumstances, I will grant your application, Mr. Lanna.

Mr. Lanna: Thank you very much, Your Honor.

The Court: The stay of execution of sentence is hereby granted.

(Whereupon, the proceedings were concluded.)

Statutes*

New York Criminal Procedure Law

§ 40.30 Previous prosecution; what constitutes

3. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which restores the action to its pre-pleading status or which directs a new trial of the same accusatory instrument, the nullified proceedings do not bar further prosecution of such offense under the same accusatory instrument.

§ 220.10 Plea; kinds of plea

4. Where the indictment charges but one crime, the defendant may, with both the permission of the court and the consent of the people, enter a plea of guilty of a lesser included offense.

5. Where the indictment charges two or more offenses in separate counts, the defendant may, with both the permission of the court and the consent of the people, enter a plea of:

(a) Guilty of one or more but not all of the offenses charged; or

(b) Guilty of a lesser included offense with respect to any or all of the offenses charged; or

(c) Guilty of any combination of offenses charged and lesser offenses included within other offenses charged.

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* The statutes are reproduced as they were in effect at the times in question.

Statutes.

§ 220.60 Plea; change of plea

1. Except as provided in subdivision two, a defendant who has entered a plea of not guilty to an indictment as a matter of right withdraw such plea at any time before rendition of a verdict and enter a plea of guilty to the entire indictment.

2. A defendant who has entered a plea of not guilty to an indictment charging the crime of murder as defined in subdivision one or three of section 125.25 of the penal law may, before the rendition of a verdict, withdraw such plea and enter a plea of guilty to the indictment only under circumstances prescribed in subdivision three of section 220-10.

3. A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw such plea at any time before the rendition of a verdict and enter a plea of guilty to part of the indictment pursuant to subdivision four or five of section 220.10.

4. At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment or to part of the indictment to withdraw such plea, and in such event the entire indictment, as it existed at the time of the plea of guilty, is restored.

§ 380.20 Sentence required

The court must pronounce sentence in every case where a conviction is entered. If an accusatory instrument contains multiple counts and a conviction is entered on more than one count the court must pronounce sentence on each count.

§ 380.30 Time for pronouncing sentence

3. Sentence on date of conviction. The court may sentence the defendant at the time the conviction is entered if:

(a) A pre-sentence report or a fingerprint report is not required; or

(b) Where any such report is required, the report has been received.

Provided, however, that the court may not pronounce sentence at such time without inquiring as to whether an adjournment is desired by the defendant. Where an adjournment is requested, the defendant must state the purpose thereof and the court may, in its discretion, allow a reasonable time.

§ 390.20 Requirement of pre-sentence report

1. Requirement for felonies. In any case where a person is convicted of a felony, the court must order a pre-sentence investigation of the defendant and it may not pronounce sentence until it has received a written report of such investigation.

2. Requirement for misdemeanors. Where a person is convicted of a misdemeanor a pre-sentence report is not required, but the court may not pronounce any of the following sentences unless it has ordered a pre-sentence investigation of the defendant and has received a written report thereof:

(a) A sentence of probation;

(b) A reformatory or alternative local reformatory sentence of imprisonment;

(c) A sentence of imprisonment for a term in excess of ninety days;

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(d) Consecutive sentences of imprisonment for terms aggregating more than ninety days.

§ 390.30 Scope of pre-sentence investigation and report

1. The investigation. The pre-sentence investigation consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits. Such investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence, and must include any matter the court directs to be included.

New York Penal Law

§ 1.05 General Purposes

5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection.

FILED
APR 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1187

UNITED STATES OF AMERICA ex rel. SHELDON SELIKOFF,
Petitioner,

against

COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1187

United States of America ex rel. Sheldon Seliköff,

Petitioner,

against

Commissioner of Correction of the State of New York,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

Opinions Below

The opinion of the District Court is reported at 393 F. Supp. 48 (S.D.N.Y. 1975). The opinion of the United States Court of Appeals for the Second Circuit is unreported and appears as petitioner's appendix 1a.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

Question Presented

Where a plea during trial follows a representation by the trial court not to impose a jail term, is the defendant accorded his constitutional rights where the Court, at the time of sentence, advises the defendant that upon the basis of later information justice requires the imposition of a jail term and affords the defendant, prior to the imposition of sentence, an opportunity to withdraw his plea?

Facts

On August 16, 1972 at a term of the County Court, Westchester County, petitioner was sentenced to state prison for a maximum term of five years after being convicted of the crimes of grand larceny in the second degree and obscenity in the second degree upon his pleas of guilty.* The judgment of conviction was affirmed by the Appellate Division, Second Department with opinion and dissenting opinions at 41 A D 2d 376. The New York Court of Appeals affirmed with opinion at 35 N Y 2d 227 (BREITEL, Ch. J.). Petition for certiorari was denied 419 U S 1122 (1975).

On May 12, 1972, during trial on indictment 997/70 in Westchester County, petitioner withdrew his pleas of not guilty to four indictments against him and entered a plea of guilty to grand larceny in the second degree under the first count of indictment 997/70. At the same time he entered a plea of guilty to obscenity in the second degree under the second count of indictment 606/70. The pleas were entered in full satisfaction of indictments 606/70,

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* The District Court states that "the papers indicate that petitioner has served at least two and a half years of the indeterminate term of up to five years to which he was sentenced." The statement is incorrect. Execution of the sentence was stayed until January 3, 1975. When the District Court's opinion was rendered, petitioner had served approximately 3½ months, not 2½ years.

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997/70, 998/70 and 999/70. The latter three indictments contained 38 counts arising out of a complicated real estate swindle.

At the time the pleas were entered, the judge said that based on the facts and representations made by the District Attorney's office and defense counsel, it was his opinion that petitioner's incarceration was not required. The Plea Minutes of May 12, 1972 show the following:

> "The Court: At this point Mr. West I would like to place on the record, Sheldon Selikoff, I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against you. Based upon the results of the conferences and conversations and the fact and representation made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises. Do you understand that?
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> Sheldon Selikoff: Yes, sir.
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> The Court: What I said Sheldon Selikoff in regard to the plea on the other indictment goes with this plea also. Do you understand that?
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> Sheldon Selikoff: Yes, sir.
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> The Court: I will not answer as to what other punishment I shall impose, I will reserve to that."

At the time the pleas were entered, the judge was not aware of the extent of petitioner's participation in the fraudulent scheme. Subsequently, he presided at the continuation of trial of the several co-defendants at which it appeared that petitioner was a principal participant in the fraud. Furthermore, the pre-sentence report indicated that petitioner denied participation in any fraud and de-

nied any guilt involving acts of sexual impropriety. Accordingly, the court informed petitioner that it could not keep the promise of no incarceration and gave him the opportunity to withdraw the pleas. The Minutes of Sentence of August 16, 1972 reflect the following:

> "The Court: . . . At the time that such pleas were entered, this Court was not aware nor was it advised as to the extent of your participation involving the fraudulent scheme which was the basis of the grand larceny in the second degree of Indictment No. 997 of 1970 to which you plead guilty.
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> This Court therefore, based upon the information it then had, informed you at the time you pleaded guilty that it did not believe that a sentence calling for your incarceration was required in the interest of justice.
>
> Subsequent to this expression of view, however, this Court presided at the trial of the several co-defendants named in the same indictment with you, which trial lasted for some six weeks. From the evidence adduced on behalf of the People's case on this trial, it appeared to this Court that your participation in the fraudulent scheme which was the basis of the larceny alleged in this court of the indictment, as well as the other larcenies alleged in the other indictments, Indictment 998 of 1970 and 999 of 1970, involving thousands of dollars, was not peripheral, subordinate or minor, but rather major and as a principal participant in the fraud.
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> In light of these facts and circumsances, the Court feels at this time that it cannot in good conscience and in the interests of justice keep the promise here as to no incarceration.
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> Furthermore, it appears from your pre-sentence report filed by the Probation Department that you deny any participation in any fraud by which sums of money were extracted from money lenders.
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> Again in regard to the indictment charging you

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with sexual impropriety, you, according to the presentence report, deny any guilt in any such acts and claim that you are a victim of some persecution.

Now, in view of these circumstances and in the interests of fairness and in the belief that the ends of justice will be served, this Court believes it should allow you to withdraw your pleas of guilty to both of the indictments and have your original plea of not guilty thereto reinstated and that you be given your day in Court to contest the charges of the People.

Accordingly, Mr. Selikoff, this Court hereby grants you the opportunity to withdraw your pleas as heretofore made as to the two indictments.

Now, what is the decision?"

Defense counsel responded that petitioner did not desire to withdraw the pleas; that counsel believed that petitioner had an absolute right to refuse to withdraw the pleas and to permit them to stand; that the defense was not as concerned with petitioner role under indictment 997 as they were with his role under 998 and 999 of 1970; that four indictments were filed against petitioner's and if he were found guilty under any one of these, it could expose him to very serious penalties and that petitioner was entitled to specific performance. Accordingly, it was petitioner's decision to affirm the pleas.

Opinions Below

The New York Court of Appeals rejected petitioner's contention that he was entitled to specific performance of a promised sentence. The court noted that although the state trial judge "did not expressly condition the prospective sentence upon his information at the time of the plea", he stated that the "prospective sentence was based on information then known and representations then made", and "by the strongest necessary implication, the

court was indicating the conditional foundation of the 'promise' ". In any case "there are policy considerations which go beyond the literal reading of the plea minutes", in that "any sentence 'promise' at the time of plea is, as a matter of law and strong public policy conditioned upon its being lawful and appropriate in light of the subsequent pre-sentence report or information obtained from other reliable sources." Hence, the fact that the court "did not explicitly condition its 'promise' (although the implication could hardly be clearer) upon its later evaluation after reading the pre-sentence report, or the facts it learned from the trial of the co-defendants, is therefore of no consequence." *People* v. *Selikoff*, 35 N Y 2d 227, 237-238 (1974).

The District Judge likewise recognized that petitioner was not entitled to specific performance of an alleged promise. Nevertheless, he ruled that due process required the state judge to "vacate the guilty pleas *sua sponte*, thereby permitting the petitioner to weigh his alternatives of going to trial on all the charges or entering guilty pleas anew without coercion or fear of offending the court."

The Circuit Court reversed the holding of the District Court. The Court observed that the New York legislature has by statute denied trial judges the authority to make any unconditional sentence promises to a defendant convicted of a felony prior to pre-sentence investigation and report. New York Criminal Procedure Law, 390.20(1) (McKinney 1971). Moreover, the Court stated that even if the defendant relied on the judge's statements, the defendant by being given the opportunity to replead by the trial court had already been accorded any relief to which he was entitled. Citing *Santobello* v. *New York*, 404 U.S. 257 (1971), the Circuit Court rejected petitioner's attempt to impose principles of contract upon the plea bargaining process.

PLEASE THROUGH

ARGUMENT

Petitioner's application for a writ of certiorari raises no substantial federal question.

Petitioner instituted his application for a federal writ of habeas corpus seeking specific performance of a representation by the trial court at the time of petitioner's plea to grand larceny and obscenity in the second degree that the trial court, upon the facts as it then understood them, would impose no jail term at the time of sentencing.* Petitioner sought a holding that the trial judge, despite the information as to petitioner's demonstrated greater fraudulent participation, could not withdraw the representation, give petitioner an opportunity to withdraw his plea and upon his refusal, sentence him to imprisonment.

However, as the Circuit Court held, petitioner was not entitled to specific performance and petitioner was accorded the relief to which he was entitled when he was allowed to replead. *Santobello* v. *New York*, 404 U.S. 257, 263 (1971). In *Santobello* this Court specifically left it to the discretion of the State court to decide whether the circumstances of the case require that a plea bargain be specifically enforced or that a defendant be afforded an opportunity to withdraw his plea.

Alternatively, petitioner argues, in an effort to circumvent *Santobello*, that the trial court's refusal to stand by its no jail term representation ran afoul of the constitutional prohibition against double jeopardy. The injection

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* One week prior to sentencing, the trial court informed the defendant that further facts had come to its attention and it could no longer comply with its prior representation as to no jail term and the Court offered petitioner an opportunity to withdraw his plea.

by petitioner of a double jeopardy claim is frivolous, and, in the context of this case, quite beside the point.

Double jeopardy is a personal right that must be presented to the trial court or it is waived. *United States* v. *Scott,* 464 F. 2d 832 (D.C. Cir. 1972); *United States* v. *Buonomo,* 441 F. 2d 922 (7th Cir. 1971), cert. den. 404 U.S. 845. The trial was terminated at petitioner's request to allow him to plea. When offered an opportunity to disavow his plea, petitioner chose to reaffirm his original decision to plead to grand larceny in the second degree and did not withdraw his plea and then oppose retrial on the ground of double jeopardy. Under these circumstances, petitioner has failed to preserve any double jeopardy claim for review.

Moreover the ingenuousness of his belatedly urged double jeopardy claim is seriously open to doubt. At the time of the plea, petitioner had only started trial on one of the four indictments against him. As his attorney pointed out, petitioner was quite concerned about the charges in the indictments that had not gone to trial, 998/70 and 999/70, and which had been covered by his plea of grand larceny in the second degree. Indictment 999/70 had included a count of grand larceny in the first degree which carried a maximum of fifteen years while grand larceny in the second degree carried a maximum of only seven years.

Finally, even assuming *arguendo* only that petitioner had preserved a credible double jeopardy claim for review, petitioner's double jeopardy argument was put to rest by this Court in *United States* v. *Tateo,* 377 U.S. 463 (1964).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, April 2, 1976.

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